

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

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Federal-State Joint Board on

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Universal Service

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CC Docket No. 96-45

**REPLY COMMENTS OF  
MINNESOTA INDEPENDENT COALITION**

April 28, 2003

## Summary

The Minnesota Independent Coalition supports the Initial Comments of the National Telephone Cooperative Association, the Organization for the Promotion and Advancement of Small Telecommunications Companies, the Montana Universal Service Task Force, and the Nebraska Independent Companies to add equal access to the list of supported services.

The Initial Comments show that adding equal access to the list of supported services would not violate Section 332(c)(8) which states that CMRS providers “shall not be *required* to provide equal access to common carriers for the provision of telephone toll services.”(Emphasis added.) Adding equal access to the list of required services would not “require” CMRS providers to provide equal access because CMRS providers retain the right to continue their current businesses operations without providing equal access.

The Initial Comments also show that equal access meets the criteria of Section 254(c)(1). Adding equal access to the list would be in the public interest, convenience, and necessity. The great majority of customers that have had the opportunity have used equal access to select 1+ carriers, and other services required by regulatory authorities have been included in the list of supported services. Further, the Commission had found that it is not necessary that each element of Section 254(c)(1) be met in order to add a service.

The principle of competitive neutrality also supports adding equal access to the list of supported services. Significant differences in service obligations cannot be ignored merely because those obligations do not arise specifically in relation to universal service. Equal access should be added to the list of supported services unless and until the Commission supersedes that obligation to provide equal access for *all* providers.

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The Minnesota Independent Coalition (“MIC”) respectfully submits the following Reply Comments. The members of the MIC are all “rural telephone companies”<sup>1</sup> providing local exchange service in the State of Minnesota. The Comments of the NTCA, OPASTCO, MUST, and Nebraska Independents<sup>2</sup> (collectively “Small LEC Comments”) show that the Commission should add equal access to the list of supported services. Adding equal access to the list of supported services would not conflict Section 332(c)(8) and meets the criteria of Section 254(c)(1). In the event that the Commission supersedes the current obligations of local exchange carriers (“LECs”) to provide equal access,<sup>3</sup> then it would be appropriate to remove the obligation to provide equal access for *all* Eligible Telecommunications Carriers (“ETCs”).

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<sup>1</sup> 47 U.S.C. § 153(37).

<sup>2</sup> *See*, National Telephone Cooperative Association (“NTCA”) Initial Comments, Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”), Comments of the Montana Universal Service Task Force (“MUST”), and Comments of the Nebraska Independent Companies (“Nebraska Independents”)

<sup>3</sup> 47 U.S.C. § 251(g) and *Notice of Inquiry Concerning a Review of the Equal Access and Nondiscrimination Obligations Applicable to Local Exchange Carriers*, CC Docket No. 02-39, *Notice of Inquiry*, FCC 02-57 (rel. Feb. 28, 2002).

**A. Adding Equal Access To The List of Supported Services Would Not Violate Section 332(c)(8).**

The Small LEC Comments show that adding equal access to the list of supported services would not violate Section 332(c)(8) because no CMRS provider would be “required” to provide equal access as a result.

The prohibition of Section 332(c)(8) is narrow and specific, reading in part:

A person engaged in the provision of commercial mobile radio services, insofar as such person is so engaged, shall not be *required* to provide equal access to common carriers for the provision of telephone toll services. (Emphasis added.)

The application of Section 332(c)(8) turns on whether a CMRS provider is “required” to provide equal access. As NTCA notes, CMRS providers “would remain free, as they are today, to choose not to offer equal access to their customers.”<sup>4</sup> The choices available to a CMRS provider and the ability of a CMRS provider *to continue* to conduct its business *without providing equal access* shows that adding equal access to the list of supported services does not “require” a CMRS provider to provide equal access within the meaning of Section 332(c)(8).

In construing statutes, the terms will ordinarily be given their plain meaning.<sup>5</sup> In determining the plain meaning of statutory terms, it is appropriate to use of dictionary definitions.<sup>6</sup> Webster’s Ninth New Collegiate Dictionary defines “require” as: “to impose a compulsion or command on: COMPEL.”<sup>7</sup> The ability of a CMRS provider to choose whether to

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<sup>4</sup> NTCA Initial Comments at p 4.

<sup>5</sup> See, e.g., *Qi-Zhuo v. Meissner*, 70 F.3d 136, 140 (D.C. Cir. 1995) (“Where . . . the plain language of the statute is clear, the court generally will not inquire further into its meaning.”)

<sup>6</sup> See, e.g., *Public Citizen v. Carlin*, 184 F.3d 900, 903 (Fed. Cir. 1999), *cert. denied*, 529 U.S. 1003, 120 S. Ct. 1267 (2000) (citing Webster’s New Int’l Dictionary Unabridged to define “form”); *Sea-Land Service, Inc. v. Dept. of Trans.*, 137 F.3d 640, 645 (Fed. Cir. 1998) (citing Black’s Law Dictionary 6th ed. 1990 for definition of “law”).

<sup>7</sup> Webster’s Ninth New Collegiate Dictionary, p. 1002; see also, The Random House Dictionary of the English Language, p. 1219 (defining require as “to call on authoritatively; order or enjoin to do something; . . . to ask for authoritatively or imperatively; demand. . .”)

seek universal service funding and to continue to operate its business without providing equal access negates the existence of any “compulsion or command” that would result from adding the equal access to the list of supported services. A party is not subject to a compulsion or command when the party’s own choice controls its obligations, and CMRS providers could continue their current business practices even if equal access was added to the list of supported services.

Further, adding equal access to the list will not result in any “indirect” requirement on CMRS providers, and CMRS providers will not be forced to choose between leaving rural markets and providing equal access. The great majority of rural CMRS providers entered their markets, including rural markets, and have conducted their businesses without receiving universal service support. As a result, it is illogical to assert that CMRS providers will be forced to withdraw from service areas that they entered have already entered *without* public financial support unless new, substantial public support is provided. Further, there is no factual support for this illogical conclusion.

**B. Equal Access Meets The Criteria For Addition To The List Of Supported Services.**

The MIC agrees with the Small LEC Comments that equal access meets the criteria of Section 254(c)(1) for addition to the list of supported services.<sup>8</sup> The MIC agrees because: 1) the overwhelming majority of customers who have been provided equal access have used equal access to select 1+ presubscribed IXC; 2) equal access has been deployed by the vast majority of carriers; and 3) adding equal access is consistent with the public interest, convenience, and necessity.

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<sup>8</sup> NTCA Initial Comments, pp 2-4; OPASTCO Comments, pp 6-12; MUST Comments, pp 9-11; Nebraska Independents Comments, pp 4-12.

Equal access can be added to the list of supported services even if it did not meet every criterion listed in Section 254(c)(1)(A) through (D). Section 254(c)(1) requires only the Joint Board and Commission “shall consider the extent to which such telecommunications services” meet those criteria. Further, the Commission has recognized that it is not necessary that each criterion be met, and that the Commission is merely required to consider those criteria.<sup>9</sup> As the Small LEC Comments show, a fair consideration of those criteria supports the addition of equal access to the list of supported services.

Equal access meets the criterion of Section 254(c)(1)(B) even though it is not a separate, tariffed “service” to which customers separately subscribe. The critical point is that the vast majority of customers who are provided equal access do *use* equal access to select 1+ carriers, even though the customers do not subscribe to equal access as a separate service.<sup>10</sup> The Commission applied the standards of Section 254(c)(1) to select the list of supported services in the *First Report and Order*<sup>11</sup> and recognized that “for purposes of Section 254(c)(1), the Commission define[s] ‘telecommunications services’ in a functional sense, rather than on the basis of tariffed services.”<sup>12</sup> Equal access similarly meets the “functional sense” of a telecommunications service, even though it is not separately tariffed. Further, the logic of the argument that equal access does not meet the criterion of Section 254(c)(1)(B) is inconsistent with the list of services already supported. DTMF is a supported service,<sup>13</sup> even though customers do not separately subscribe to that feature, but instead receive that feature as part of their basic local service.

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<sup>9</sup> Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776 ¶ 61 (1997) (“*First Report and Order*”)

<sup>10</sup> NTCA Comments, p. 3.

<sup>11</sup> *Id.* ¶¶ 58, 59.

<sup>12</sup> *Id.* ¶ 61.

Equal access also meets the criterion of Section 254(c)(1)(C) even though LECs are obligated to provide equal access to comply with federal and many state regulatory requirements. Under the logic of the argument that equal access does not meet the criterion of Section 254(c)(1)(C) because LECs are obligated to provide the service, access to operator services and directory services would not meet the criteria for support because those services are typically required by state regulators or state statutes, rather than as a result of market forces. However, operator services and directory assistance are included in the list of supported services.<sup>14</sup>

Accordingly, the arguments that equal access does not meet the criteria of Section 254(c)(1)(B) and (C) should be rejected.

**C. Competitive Neutrality Requires That No Category Of ETCs Be Required To Provide More Services Than Others.**

Withholding equal access from the list of supported services, while continuing to require LECs to provide equal access, violates the principle of competitive neutrality.<sup>15</sup> For the small number of LECs that have not received a request for equal access, a waiver would be appropriate,<sup>16</sup> and CMRS providers in those areas should also not be required to provide equal access. Similarly, if the Commission supersedes the equal access obligations of LECs, equal access should be removed from the list of supported services.

The CMRS industry is far different than it was in 1997 at the time of the *First Report and Order*. CMRS service providers now enjoy dramatically increased numbers of subscribers and have experienced dramatic success in competing with LECs. As a result, any prior justification for conforming universal service policy to assist the emergence of CMRS providers has now

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<sup>13</sup> 47 C.F.R. § 54.101(a)(3).

<sup>14</sup> 47 C.F.R. § 54.101(a)(6) and (8).

<sup>15</sup> MUST Comments, p 11; NTCA Comments, pp. 5-6; OPASTCO Comments, p. 10; Nebraska Independents Comments, p. 9; Comments of United States Telecom Association, p 5-6.

expired. Instead, the Commission should now adopt a policy that recognizes that competitive neutrality runs in both directions.

The principle of competitive neutrality should not be artificially compartmentalized and confined to only regulations that relate specifically to universal service. Rather, the principle of competitive neutrality should take into consideration the extensive service obligations of LECs and the absence of comparable obligations on CMRS providers, irrespective of the regulatory source of those obligations. At a minimum, the Commission should take into account all significant customer service obligations that *it has imposed* in assessing competitive neutrality. Certainly, limiting consideration to only regulations that arise specifically from universal service is an artificially narrow approach that the Commission should reject.

Such an approach would ignore the competitive realities facing LECs, which reflect their total customer service obligations and are unaffected by the sources of those obligations. A LEC that faces substantial customer service obligations not faced by a CMRS provider is not in a competitively neutral position even if the obligations do not arise directly from universal service requirements. Further, it is particularly inconsistent with competitive neutrality to rely on the ongoing obligations of LECs to provide equal access in order to minimize the importance of equal access in relation to CMRS providers.<sup>17</sup>

Since equal access meets the applicable criteria of Section 254(c)(1)(A) through (D), the principle of competitive neutrality further supports the addition of equal access to the list of supported services.

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<sup>16</sup> OPASTCO Comments, p 13.

<sup>17</sup> MUST Comments, p. 11; NTCA Comments, pp. 5-6; OPASTCO Comments, p. 10; Nebraska Independents Comments, p. 9.

### **Conclusion**

For the reasons set forth above, the Commission should add equal access to the list of services supported by equal access. If the Commission concludes in another proceeding that LECs should not be required to provide equal access, then the same factors that may lead to that decision would also justify removing equal access from the list of supported services for all ETCs.

Respectfully submitted,

MINNESOTA INDEPENDENT COALITION

A handwritten signature in dark ink, appearing to read "Richard J. Johnson". The signature is fluid and cursive, with the first and last names being more prominent.

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By Richard J. Johnson, Its Attorney